82-574

No. 82____

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1982

NANCY L. STEVENSON AND L. MARION GRESSETTE,
APPELLANTS

versus

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., *et al.*, AND RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, *et al*, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

In fashioning a remedy for malapportionment, is a Federal District Court at liberty to ignore a longstanding provision of the South Carolina Constitution requiring Congressional Districts to be comprised of whole counties, where county lines can be preserved without violating the principle of "one man, one vote"?

PARTIES TO THE PROCEEDING

The action below was commenced by the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc.; William F. Gibson, its President; and Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden. The individual plaintiffs were identified in the complaint as black registered voters in the State of South Carolina. These parties are referred to herein as "Plaintiffs".

The defendants below were Richard W. Riley, Governor of the State of South Carolina; Nancy Stevenson, Lieutenant Governor of the State of South Carolina; L. Marion Gressette, President *Pro Tempore* of the South Carolina Senate; Raymon Schwartz, Jr., Speaker of the South Carolina House of Representatives; Robert J. Sheheen, Chairman of the Judiciary Committee of the South Carolina House of Representatives; and James Ellisor, Executive Director of the South Carolina Elections Commission.

Defendants Riley, Schwartz, Sheheen and Ellisor were jointly represented below, and are sometimes referred to in the opinions and orders below and herein as the "House Defendants". Appellants Stevenson and Gressette are sometimes referred to below as the "Senate Defendants".

TABLE OF CONTENTS

PAGE

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions and Orders Below 2

Jurisdiction 2

Authorities Involved 3

Statement of the Case 5

The Question Presented Is Substantial 8

Conclusion 15

Appendices

Appendix A: Preliminary Order of the District Court, March 8, 1982 19

Appendix B: Final Order of the District Court, April 30, 1982 28

Appendix C: Order Denying Application for Injunction, June 2, 1982 30

Appendix D: Letter from Robert W. Kuhn to Margarett Ford, Esq., June 8, 1982 32

TABLE OF AUTHORITIES

PAGE

Cases:

Boyer V. Gardner, 540 F. Supp. 524 (D. N. H. 1982) .. 9

Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982) 12

Gaffney v. Cummings, 412 U. S. 735 (1973) 12, 13

Jordan v. Winter, 541 F. Supp. 1135 (N. D. Miss. 1982) . 9

O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982) .. 9

Reynolds v. Sims, 377 U. S. 533 (1964) 10, 11, 14

Smiley v. Holm, 285 U. S. 355 (1932) 9

Upham v. Seamon, —— U. S. ——, 102 S. Ct. 1518 (1982 10

Wesberry v. Sanders, 367 (U. S. 1 (1964) ..8, 9, 10, 12, 13

White v. Weiser, 412 U. S. 783 (1973) 9, 10

Wisconsin AFL-CIO v. Elections Board, 543 F. Supp. 630 (E. D. Wis. 1982) 9

Constitutional Provisions and Statutes:

United States Constitution:

Article I, Section 2 .....2, 3, 6, 7, 10, 11, 13

Article I, Section 4 10

South Carolina Constitution:

Article VII, Section 9 .....5, 9

Article VII, Section 13 .....5, 7, 8, 9

United States Code:

28 U. S. C. § 1253 3

28 U. S. C. § 2284 2

42 U. S. C. § 1973 2

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JURISDICTIONAL STATEMENT

OPINIONS AND ORDERS BELOW

The three-judge district court on March 8, 1982, entered a preliminary order and opinion on the merits of this action. A copy of this order is attached hereto as Appendix A. Following a further submission to the court by House Defendants, a final order dated April 30, 1982 was entered. A copy of this order is attached hereto as Appendix B. Plaintiffs subsequently sought an injunction from the district court against the implementation of the court ordered reapportionment plan. That application was denied by the district court on June 2, 1982. A copy of that order is attached hereto as Appendix C. A similar application addressed to this Court was denied on June 7, 1982, as is reflected by the letter attached hereto as Appendix D.

JURISDICTION

On October 14, 1981, plaintiffs below initiated this action challenging the apportionment of South Carolina's congressional districts under Article I, Section 2 of the United States Constitution and the Voting Rights Act of 1965, 42 U. S. C. Section 1973, *et seq.*

A three-judge district court was convened pursuant to 28 U. S. C. § 2284. The court took evidence and heard arguments of counsel on February 11, 1982.[1]

On March 8, 1982, the district court entered its preliminary order which agreed in principle with a reapportionment plan submitted by House Defendants, but which required that it be modified.

In accordance with the directives of the court, House Defendants on March 16, 1982, submitted additional infor-

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[1] The instant case was consolidated for hearing on the merits with a similar action brought by different plaintiffs. The opinions and orders of March 8, 1982 and April 30, 1982 referred to above dealt with the consolidated cases. Plaintiffs in the companion case have not appealed from those orders.

mation to the court in connection with the modification of the plan. On April 30, 1982, the court ordered the plan as modified into effect.

On May 24, 1982, plaintiffs below appealed from this order and the preliminary order of March 8, 1982. Plaintiffs sought but were denied an injunction against the implementation of the plan by the district court on June 2, 1982, and by this Court on June 7, 1982.

Plaintiffs' Jurisdictional Statement was received on October 4, 1982. Appellants rely on Rule 12.4 of the Rules of the Supreme Court of the United States to initiate this cross-appeal from the orders entered by the three-judge court on March 8, 1982 and April 30, 1982.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1253.

AUTHORITIES INVOLVED

Article I, Section 2 of the United States Constitution provides as follows:

> **§2. House of Representatives; how constituted; power of impeachment.**
>
> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.
>
> No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.
>
> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to ser-

vice for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

§ 2. Apportionment of representatives in Congress.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear

to the whole number of male citizens twenty-one years of age in such state.

Article VII, Section 9 of the South Carolina Constitution provides as follows:

> § 9. **Election district; body corporate.** Each County shall constitute one election district, and shall be a body politic and corporate.

Article VII, Section 13 of the South Carolina Constitution of 1895 provides as follows:

> § 13. **Judicial and Congressional Districts; voting precincts.** The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, as it may deem wise and proper, and may establish or alter the location of voting precincts in any County.

STATEMENT OF THE CASE

Article VII, Section 9 of the South Carolina Constitution of 1895 provides that "[e]ach County shall constitute one election district. . . ." Article VII, Section 13 of the South Carolina Constitution further provides, in pertinent part:

> The General Assembly may at any time arrange the various counties into Judicial Circuits, and into Congressional Districts . . . as it may deem wise and proper . . . .

Pursuant to those constitutional requirements, every congressional district created by the South Carolina General Assembly since 1902 has been composed of entire counties. Not once has a county been divided among two or more districts.

Following receipt of population data from the 1980 census, the General Assembly of South Carolina began consideration of congressional reapportionment during the

1981 legislative session. No agreement between the two chambers was reached at that time, however, and the matter was deferred until the January 1982 session.

Plaintiffs brought this action in October of 1981, after the 1981 session of the legislature had adjourned without enacting a plan. House Defendants and Appellants urged the court to defer action until the General Assembly had an opportunity to act during the 1982 session.

Congressional reapportionment was the first major business taken up by the House and the Senate when the 1982 session convened in January. Again the two chambers were unable to agree on a plan. With time running out, a plan of last resort which divided Berkeley County between two districts was passed by the South Carolina House of Representatives. In deference to the requirements of the above-quoted state constitutional provisions, the South Carolina Senate declined to approve any proposed plan of congressional redistricting which did not preserve county lines. With the legislature thus deadlocked, the three-judge court was convened, took evidence and heard arguments on the merits on February 11, 1982.

At the hearing below, Appellants did not offer or support any particular plan. Rather, Appellants urged the district court to adopt a plan which satisfied the requirements of Article I, Section 2 of the United States Constitution, while preserving the integrity of county lines as required by the South Carolina Constitution. The House Defendants presented as their proposed plan the so-called "0.28" Plan which divided Berkeley County and which had passed the South Carolina House.

In its orders of March 8, 1982 and April 30, 1982, the three-judge court rejected Appellants' contention that deference to state constitutional law in this area was required

where Article I, Section 2 of the United States Constitution was not violated. The three-judge court recognized the substantial interest of the State in the preservation of county lines, but was of the opinion that Article VII, Section 13 of the South Carolina Constitution was permissive rather than mandatory. The district court further held that, in any case, state constitutional provisions were not binding upon a federal court seeking to remedy a violation of Article I, Section 2.

The Plaintiffs in this case and the plaintiffs in the companion case below both proposed plans for adoption by the district court which preserved county lines. The Plaintiffs' plan had a total population variance of 2.61%, while the plan proposed in the companion case had a variance of 1.55%. In addition, the Appellants, at the request of the district court, identified several plans which preserved county lines *and* resulted in lower population variances than either of the plans proposed by the plaintiffs in the two cases. The only plan with a lower variance than all of the plans identified by Appellants, was the so-called "0.28" Plan proposed by the House Defendants; but, it, of course, split county lines.

Although House Defendants supported the so-called "0.28" Plan which divided Berkeley County, they recognized the legitimacy of the State's interest in preserving county lines:

> Regarding the State's policy as to redistricting, no plan that was adopted by either the House or the Senate failed to respect county lines either completely or in large measure. In observing county lines in the construction of congressional districts, both houses of the legislature adhered to an eighty-year practice regarding congressional redistricting and acted pursuant to Article V, [sic] Section 13 of the State Constitution.

Brief below of Defendants Riley, Schwartz, Ellisor and Sheheen, at 16-17.

No party below seriously disputed that plans identified by Appellants, ranging from 0.73% to 2.37% in total population variance, satisfied the "one man, one vote" principle of *Wesberry v. Sanders*, 367 U. S. 1 (1964). No party disputed that the preservation of county lines in congressional redistricting has been a longstanding and unvaried state practice under Article VII, Section 13 of the South Carolina Constitution.[2] Despite the lack of controversy on these points, the district court ignored settled state law and policy in favor of a plan which violates county lines. From that decision Appellants now appeal.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal presents a substantial question of constitutional law in the area of reapportionment. At issue is the relationship between federal and state law in the electoral process. The case offers this Court an opportunity to clarify and reaffirm important principles suggested in prior reapportionment decisions, but not developed sufficiently to give proper guidance to lower federal courts.

The district court in this case held that

> ... South Carolina's constitutional provision addresses the power of the legislature. It has nothing to do with the power of this court, and it is relevant to our decision only insofar as it may be read as an expression of a general state policy against dividing counties in the course of congressional redistricting.

Order of March 8, 1982, at 7. This holding is in direct conflict with recent decisions of other federal courts dealing

[2] In addition to their 2.61% Plan, Plaintiffs proposed two plans which violated county lines. However, they did not dispute the fact that county lines have been observed in every congressional reapportionment since the ratification of the South Carolina Constitution in 1895.

with judicial reapportionment. *See, e.g., Jordan v. Winter,* 541 F. Supp. 1135 (N. D. Miss. 1982); *Boyer v. Gardner,* 540 F. Supp. 624 (D. N. H. 1982); *Wisconsin A.F.L.-C.I.O. v. Elections Board,* 543 F. Supp. 630 (E. D. Wis. 1982); *O'Sullivan v. Brier,* 540 F. Supp. 1200 (D. Kan. 1982).

In view of prior decisions of this Court, the district court's judgment should be reversed. State constitutional law should not be disregarded by federal courts where it can be applied without violating federal constitutional principles. No conflict between the state and federal constitutions is present on the facts of this case, and the district court's failure to adhere to Article VII, Section 9 and Article VII, Section 13 of the South Carolina Constitution was error.

The decision of this Court in *Wesberry v. Sanders, supra,* made clear that congressional districts were to reflect substantially equal population distribution. Such equality of population is concededly the first object of reapportionment. However, *Wesberry* should not be read in isolation. Other decisions of this Court have held that state laws and policies also have an important place in determining the composition of congressional districts. *Smiley v. Holm,* 285 U. S. 355 (1932) expressly held that federal constitutional law incorporates state constitutional provisions relating to congressional reapportionment. Similarly, *White v. Weiser,* 412 U. S. 783 (1973) recognized that

> [j]ust as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should honor state policies in the context of congressional reapportionment. In fashion-

> ing a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' *Whitcomb v. Chavis*, . . . 91 S. Ct. at 1878. 412 U. S. at 795.

Appellants recognize that state policies may not be advanced to defeat the equal population principle of *Wesberry*. Decisions since *Wesberry*, however, have held that there is considerable room for the application of state law in the context of reapportionment. *Weiser* makes clear that decisions of a state legislative body reached in furtherance of the admittedly legislative process of reapportionment, *Reynolds v. Sims*, 377 U. S. 533 (1964), "should not be unnecessarily put aside [by a court] in the course of fashioning relief appropriate to remedy what were held to be impermissible population variances between congressional districts." 412 U. S. at 796. Indeed Article I, Section 4 of the United States Constitution expressly provides that "[t]he times, places and manner of holding election for senators and representatives, shall be prescribed in each state by the legislature thereof . . . ."

The continued viability of state law in regard to congressional reapportionment was recently reaffirmed by this Court in *Upham v. Seamon*, ____ U. S. ____, 102 S. Ct. 1518 (1982). The opinion in *Upham* quotes the cited language from *Weiser* with approval, and goes on to reaffirm that "[t]he *only* limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject." 102 S. Ct. at 1521 [emphasis added].

Thus, both state and federal law were intended to operate concurrently in the electoral process. The primacy of the federal constitution is not challenged by Appellants. However, the one man, one vote requirement of Article I, Section 2 does not require that legitimate state interests,

expressed in the state constitution, be unnecessarily sacrificed. The protection of the right to vote may be accomplished by the concurrent application of both federal and state constitutional principles.

Fair and effective representation for all voters is the goal of reapportionment. Fair and effective representation, however, is not a function of mathematics alone. As expressed in *Reynolds v. Sims* in the context of the reapportionment of a state legislative body:

> [I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness is hardly a workable constitutional requirement.

377 U. S. at 577.

The teaching of *Reynolds* is ignored in the reapportionment plan adopted by the district court in this case. It is the right to vote which is protected by Article I, Section 2 of the Constitution. When the plan adopted by the district court in this case is analyzed by voting age population, however, it does not differ significantly from other plans available to the lower court which did not cross county lines.

TABLE 1[3]

COMPARISON OF PLANS BASED ON VOTING AGE POPULATION

	Plan			
District	*0.28*	*0.73*	*0.98*	*1.48*
1	363,074	361,289	362,818	359,280
2	372,281	372,281	357,822	371,463
3	366,313	363,538	366,318	357,071
4	373,015	373,670	373,015	373,015
5	357,907	365,261	372,721	372,721
6	347,250	343,806	347,151	346,295
Total % Variance	±7.09	±8.20	±7.12	±7.35

As Table I demonstrates, when the standard of measurement is the right to have one's *vote* weighted equally, the court adopted plan is not preferable. Its adoption on the basis of its *apparent* adherence to the "one-man, one-vote" principle was an arbitrary exercise of judicial power. From the perspective of protecting the right to vote, the justification advanced for cutting county lines disappears. There is no constitutional reason to violate county lines to achieve the level of population equality created by the district court plan. At best it creates only "an illusion of better equality." *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982).

The district court in this case, however, not only pursued this illusion, but did so at the expense of a legitimate state interest in the preservation of county lines. This was unnecessary to satisfy *Wesberry*, since the court had several plans before it which both preserved county lines *and* achieved substantial population equality among the dis-

[3] The data in Table 1 are derived from Defendant's Exhibit 9, which reflects the 18 years and over population of each county in the state as of April 1, 1980.

tricts. The preference of the district court for the plan with the lowest population variance at the expense of South Carolina constitutional law was particularly unwarranted because of the inherent inaccuracy of the census data upon which such a choice necessarily rests:

> . . . [T]he basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals and published as soon as possible after the beginning of each decade. These figures may be as accurate as such immense undertaking can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this fact, and, unless they are to be wholly ignored, it makes little sense to conclude from relatively minor census population variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments.

Gaffney v. Cummings, 412 U. S. 735, at 745-48 (1973).

The concerns expressed in *Gaffney* are equally applicable to congressional redistricting. Because census data are inaccurate, errors become magnified when larger population segments are analyzed. The inaccuracies pointed out in *Gaffney*, when applied to a congressional district of one half million people, will produce an even larger total error. For this reason, attempts to reduce population variances in congressional districts to marginally smaller percentages does little to preserve the fair and effective representation required by *Wesberry*.

This does not mean, however, that Article I, Section 2 of the United States Constitution is without any substance or that no remedy for malapportionment can be effective. *Gaffney* struck the necessary balance between mathematics and the protection of the right to vote:

> . . . *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment" . . . and it was for that reason that the decision insisted on substantial equality of populations among districts.
>
> This is a vital and worthy goal, but surely the attainment does not in any way depend upon eliminating the insignificant populations variations involved in this case. Fair and effective representation may be destroyed by gross population variances among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may legitimately be mindful of . . . An unrealistic overemphasis on raw population figures, a mere nose count in the district, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operations are important to an acceptable representation and apportionment arrangement.

412 U. S. at 748-49.

Both state and federal law must concurrently operate to protect the right to vote and to provide fair and effective representation for the people. To ignore state law to achieve "better" mathematical equality among districts is to ignore the legitimate interests of the citizens. In the present case, Appellants respectfully suggest that important state interests were sacrificed to achieve only an illusion of greater equality. If the orders of the district court are allowed to stand, the achievement of fair and effective representation will henceforth be simply a matter of mathematics.

CONCLUSION

For the reasons above stated, Appellants respectfully urge that this Court note probable jurisdiction of the cross-appeal.

Respectfully submitted,

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